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No. 367

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Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION,

Petitioner,

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Motion of The State of Montana to Appear Amicus Curiae and Adopt Brief of Respondents

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ARNOLD H. OLSEN,
Attorney General of the State of Montana

CHARLES W. LEAPHART,
Assistant Attorney General, State of Montana.

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NOW COMES the State of Montana, in its sovereign capacity, by Arnold H. Olsen, its Attorney General, and moves the Court for leave to appear in this cause as amicus curiae and in lieu of filing a brief of amicus curiae to adopt the briefs of the respondents filed herein.

The following is a statement of the nature of applicant's interest, the state laws involved, and the grounds on which this motion is made:

The State of Montana is, by Section 43, U.S.C.A. 323, one of the western states to which the Desert Land Act applies. Further, Article III, Section 15 of the Constitution of the State of Montana provides that the use of all water

in the State of Montana shall be held to a public use. This public use has been jealously protected for Montana citizens by Section 89-846, R.C.M., 1947, as below set forth:

> "Appropriation Of Waters For Use Out Of State—Regulation. None of the waters in the state of Montana shall ever be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries thereof, except pursuant to a petition to and an act of the legislative assembly of the state of Montana permitting such action, and any appropriation, diversion, impounding, restraining, or attempted appropriation, diversion, impounding, or restraining, contrary to the provisions of this act shall be null and void; and all officers, agents, agencies, and employees of the state are prohibited from knowingly permitting, aiding, or assisting in any manner such unauthorized appropriation, diversion, impounding, or other restraint. It shall be unlawful for any persons, persons, or corporation, directly or indirectly, personally or through agents, officers, or employees, either to attempt to so appropriate, divert, impound, or otherwise restrain or control any of the waters within the boundaries of this state for use outside thereof, except in accordance with the terms of this act."

Water users in the State of Montana must appropriate those rights of use in accordance with certain statutory proceedings set forth in the Montana laws. That the doctrine of riparian rights has been superseded in the State of Montana is not a matter of question. Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702; Meine v. Ferris,

126 Mont. 210, 247 Pac. (2d) 195. See, also, Thorpe v. Freed, 1 Mont. 651, and Smith v. Denniff, 24 Mont. 20, 60 Pac. 398.

Sections 89-801, R.C.M., 1947, et seq., establish the procedure for appropriating the use of waters in Montana to the exclusion of any riparian rights thereto.

Further, Section 67-302, R.C.M., 1947, provides that the State is the owner of all land below the waters of navigable lakes and streams. The riparian land owner on non-navigable streams is the owner of the bed of the stream, unless the stream forms a boundary between two adjoining owners. In that event, each owner owns the bed of the stream to the middle thereof. The riparian owner owns the land to the low water line of navigable streams subject to certain public use between the high and the low water marks.

There have been a long line of Montana decisions with respect to the rights of the beneficial use of waters in this state. From the time of the Bannack statutes in 1865 these rights have been adjudicated by the authority of the State of Montana in the courts of the State of Montana, and according to the rights provided by the Constitution of the State of Montana. Smith v. Denniff, supra; City of Helena v. Rogan, 26 Mont. 452, 68 Pac. 798; Featherman v. Hennessy, 42 Mont. 535, 113 Pac. 751; Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081; State ex rel. Reeder v. District Court, 100 Mont. 376, 47 Pac. (2d) 653. It has long been

the position of the executive departments in the State of Montana that the use of waters in Montana is primarily for the benefit of the people of Montana. This cardinal consideration underlies negotiations with Canada and neighboring states with respect to the useage of waters flowing into and out of Montana. Water is one of the greatest national resources in the state. Its use has been explointed in only a small degree but in the future many benefits will accrue to the people of Montana from the proper utilization of the virtually untapped resources. A decision by the Supreme Court pre-empting the state from its authority to regulate the use of public waters would undermine the statutory and case law that has been a part of Montana jurisprudence since 1865. Furthermore, it would seriously jeopardize the existing system of water rights of the various users in the state. A decision by the Supreme Court upsetting this doctrine of public rights which has been established in accordance with the sovereign powers of the State of Montana would be an unreasonable projection of federal power into a realm which is primarily a matter of state jurisdiction. The use of these waters only incidentally affects the rights of the peoples of the United States at large and should not give rise to an exercise of the authority by the federal government where the need does not exist.

Respectfully submitted,

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CHARLES W. LEAPHART,
Assistant Attorney General, State of Montana.